

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

ORIGINAL
WITH PROOF
OF SERVICE

77-1302

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

UNITED STATES,

Appellee,

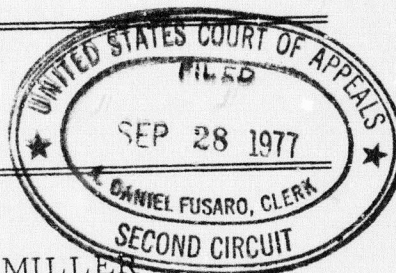
-v-

KIVA MILLER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT
APPENDIX



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1302

UNITED STATES,

Appellee

-v-

KIVA MILLER,

Defendant-Appellant

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Defendant-Appellant, Kiva Miller, submits this brief in support of his appeal from a judgment of conviction of probation violation and from the sentence imposed thereon entered July 1, 1977 in the Eastern District of New York.

ISSUES PRESENTED FOR REVIEW

1. WHETHER THE COURT BELOW ABUSED ITS DISCRETION IN SENTENCING THE APPELLANT BY FAILING TO INDIVIDUALIZE THE SENTENCE TO THE DEFENDANT AT BAR?
2. WHETHER THE COURT BELOW ABUSED ITS DISCRETION IN VIOLATING THE APPELLANT'S PROBATION AND IN SENTENCING APPELLANT TO 18 MONTH'S CONFINEMENT AS A RESULT OF A MINOR VIOLATION OF HIS PAROLE CONDITIONS?
3. WHETHER A SENTENCE OF 18 MONTH'S CONFINEMENT IMPOSED FOR A MINOR VIOLATION OF PROBATION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

STATEMENT OF THE CASE

On September 5, 1975 Appellant pleaded guilty to one count of a three count indictment charging conspiracy to manufacture Methaqualone. On November 7, 1975 Appellant was sentenced to imprisonment for five years, to serve three months. The execution of the balance was suspended and Appellant placed on probation for four years. Appellant was also fined \$10,000.00.

On May 2, 1977 a violation of probation report was filed with Hon. Thomas C. Platt as a result of Appellant's arrest and ultimate plea to disorderly conduct in the State Courts.

Thereafter, on July 1, 1977 after a brief hearing was conducted, Appellant pleaded guilty to a violation of probation and was sentenced to imprisonment for 18 months. On July 18, 1977 this Court denied Appellant's Motion for bail pending the determination of the appeal.

STATEMENT OF FACTS

Kiva Miller is a 30 year resident of Brooklyn who pleaded guilty in September 1975 to one count of conspiracy to manufacture Methaqualone. Miller, who had no criminal record, was operating a trucking company and as part of his deliveries was picking-up and delivering certain chemicals to Harvey Segal who was to become Miller's co-defendant. Segal, apparently unknown to Miller was using the chemicals in combination with others to illegally produce the prescription type drug Methaqualone.* However, there came a time when Miller learned of the manufacture of the drug but he still continued to make the deliveries.**

Despite Miller's clean record and the fact that he had a wife and business employees to support, Appellant was sentenced to 5 year's confinement with all but three months suspended, four years probation, and a \$10,000 fine. The maximum sentence could have been five years and \$15,000.00. In explaining the imposition of jail time, the district judge stated that his policy and that of every other judge in the courthouse was to impose some punishment for drug offenders.

* A 9

** A 9

On January 23, 1977 Appellant was arrested by the New York Police Department and charged with several offenses which were reduced to Petit Larceny, Criminal Trespass and Disorderly Conduct. All charges were dropped with the exception of Disorderly Conduct to which Appellant pleaded guilty and paid a fine of \$100.00.

The evidence adduced by the U.S. Attorney's Office at a hearing on the probation violation disclosed that Appellant had removed several cartons of toys from a warehouse which has been gutted by fire. Apparently, Appellant in his truck passed by the warehouse, saw the boxes sitting outside the warehouse and carried them to his truck. An off-duty police officer claimed to have seen Appellant enter the warehouse to remove some of the cartons, but there was some dispute as to whether Appellant had simply taken them from outside the gutted building or had actually entered it.*

While several other individuals had also taken cartons, the owner was not interested in pressing charges and the District Attorney's Office in New York County accepted the plea to disorderly conduct to satisfy Appellant's wrongdoing.

*A 12 - A 14

On July 1, 1977 after several persons testified regarding the above incident, Appellant pleaded guilty to violating his probation by committing the above-described act. There was no question that Appellant had notified his probation officer immediately after his arrest and the probation officer so stated on the record.* Nor was there any other claim of failure to comply with the terms of his probation since Appellant's conduct in every other respect had been exemplary.**

After stating that Appellant "was the only one that has come back to me on a violation of probation since my three years on the bench, and it was--it's a real shock to me," the district judge sentenced Appellant to 18 month's confinement.

*A 15

**A 7, A16 - A17

POINT I

THE DISTRICT COURT ABUSED ITS
DISCRETION IN FAILING TO INDIVIDUALIZE
APPELLANT'S ORIGINAL SENTENCE

Appellant's sentence after the finding of a probation violation is obviously and inexorably tied in to the sentence he received for his drug offense in 1975. Appellant submits that the imposition of 18 month's imprisonment based on a violation of the conditions of his initial sentence must be vacated as a result of the improper sentence originally ordered.

After pleading guilty to conspiracy to manufacture Methaqualone in 1975, Appellant was sentenced, inter alia, to five year's imprisonment with all but three months suspended. This five year sentence, the maximum imprisonment permitted under the statute, was imposed, in the words of the sentencing Judge, because

It is the policy of this Court, and I think it's almost true of every courtroom in this building, in a case of a drug offense, some punishment must be imposed.* (emphasis added)

While the district court's sentence was within the statutory maximum, the court's sentence pursuant to a "policy" requiring some jail time, voided the sentence and requires this Court to vacate the sentence and remand for further proceedings.

It is well settled in this Circuit that a sentence within the statutory limits is not ordinarily reviewable on appeal. However, an increasing body of precedents, recognized in this Circuit, permits appellate review of the district court's exercise of discretion under certain circumstances.

One of the prime areas in which sentences have been reviewed--and vacated--is the failure of the district court to individualize the sentence to the defendant at bar. Such is the situation herein presented.

At the time of sentence, Mr. Miller was a 28 year old family man operating a steady and growing business with no prior criminal involvement. He had served his country in the Navy, fought in South East Asia and had even attempted to stay on in the SeaBee's. While the offense was for drugs, the particular substance involved was not one of the major narcotics which have been thought to be causing havoc in our cities.

Despite the particulars of the defendant, he was given the maximum jail time. And although most of the jail time was suspended, it was replaced with a long probation and a \$10,000 fine (despite the absence of allegations that Mr. Miller had profited to such a huge degree.) This heavy sentence was imposed pursuant to a policy to punish drug offenders, to treat drug offenders, as a class, differently than other type offenders. The use of such policy was totally improper and constituted an abuse of discretion.

While federal appellate courts will not ordinarily review sentences, the process "is not wholly immunized from judicial review solely because the sentence imposed upon the offender falls somewhere within certain statutory limits." United States v. Daniels, 446 F. 2d 967, 969 (6th Cir. 1971). Thus, in the words of Daniels,

...while the District Court is permitted broad latitude in discharging its 'duty to impose a proper sentence,' the exercise of the District Court's discretion will be subject to appellate scrutiny under limited circumstances...

United States v. Daniels,
supra, 446 F. 2d at 970.

The Court went on to state that one of the recognized areas of scrutiny results from a failure of the district court to individualize a sentence.

A trial court which fashions an inflexible practice in sentencing contradicts the judicially approved policy in favor of 'individualizing sentences.'

United States v. Daniels,
supra, 446 F. 2d at 971

See also, Williams v. New York, 337 U.S. 241, 247-248, 69 S. Ct. 1529 (1949); Woosley v. United States, 478 F. 2d 139 (8th Cir. 1973); United States v. Wiley, 267 F. 2d 453, 455 (7th Cir. 1959); United States v. Wilson, 450 F. 2d 495 (4th Cir. 1971).

This Court has recognized that the use of a "fixed and mechanical approach" in imposing sentence requires the Court to invalidate the sentence. United States v. Schwartz, 500 F. 2d 1350, 1352 (2d Cir. 1974). While Judge Moore dissented in Schwartz, because he believed such mechanical approach was not utilized in that case, he recognized in his dissent that "mechanical sentencing" did result when a sentence was based on a "fixed sentencing policy based on the category of crime", rather than on the individualized record of the defendant", citing United States v. Baker, 487 F. 2d 360, 361

(2d Cir. 1973).* Thus, even using Judge Moore's stricter standard, the instant case constitutes an invalid sentence since the "category of crime" caused a harsher punishment.

While Congress has set the maximum sentences allowable, it is obvious that there is an "implied legislature will to impose a lesser sentence where appropriate." United States v. Daniels, supra, 446 F. 2d at 972.

The sentencing judge left no doubts that the harshness of the sentence was the result of a deliberate "policy" utilized by the judge if not by the entire "courthouse". And while the judge may have reduced the amount of jail time initially to be served because of the particular defendant at bar, the sentence was still greater punishment because of the "category of crime." The sentence was, therefore, invalid.

It follows from the above conclusion, that a further imposition of sentence resulting from a probation violation cannot be justified if the original sentence was invalid. The harshness of the additional sentence (see Point II, infra) must

*United States v. Schwartz, supra, 500 F. 2d at 1354.
(Emphasis added)

be viewed in light of the original sentence. Both the original sentence and the additional sentence should be vacated and remanded to a different judge for sentencing. It is difficult to see how the situation could be remedied in any other manner. But despite the difficulties involved, justice to Mr. Miller requires that it be done.

POINT II

THE DISTRICT COURT ABUSED ITS DISCRETION IN REVOKING APPELLANT'S PROBATION AND SENTENCING APPELLANT TO 18 MONTH'S CONFINEMENT FOR A MINOR VIOLATION OF PROBATION

Appellant submits that the sentence of 18 month's confinement for a minor violation of State law resulted not only from the improper, overly-harsh original sentence, but also from the use of improper standards in imposing the additional punishment.

Appellant came before the Court after wrongfully taking some cartons of toys from either inside or outside of a burned-out warehouse. The act was apparently not significant enough for the owner to press charges (A 6), and the district attorney's office felt that the people of the State of New York were satisfied with a plea of guilty to disorderly conduct.

Disorderly conduct is classified under State Law as a violation, something less than a misdemeanor, and not a crime, New York Penal Law, §§10, 240.20. And while the district court could clearly consider the underlying acts or even the arrest itself as constituting a violation of probation, there was nothing to warrant the imposition of such an incredibly drastic sentence.

It must be borne in mind that the Appellant had satisfactorily been complying with all the terms of his probation.* He had been reporting to his probation officer, working steadily at his trucking business, and paying off his fine. He notified his probation officer immediately after his arrest, and the arrest itself was totally unrelated to his drug conviction of two years earlier. Appellant had simply seen some cartons at a gutted warehouse and, not really knowing whether or not they were being discarded, took some. While Appellant does not seek to justify his actions, it is clear that imprisonment for 18 months was not warranted.

* A 7

There are, then, two possible explanations for the drastic sentence. One possibility is that the original harsh sentence was re-invoked to again punish Appellant as has been examined in Point I. The other factor is that the sentencing judge became personally involved in the violation to a degree that the court's objectivity was destroyed.

In imposing the 18 month sentence, the district court made it appear that Appellant's violation was a personal affront--if not attack--on the court itself. Thus, the judge stated:

I think you may be the only one that has come back to me on a violation of probation since my three years on the bench, and it was--it's a real shock to me.*

The Judge's anger at the violation is apparent in the colloquy immediately following the remarks above.

THE DEFENDANT: It will never happen again.

THE COURT: It's not going to, because I'll tell you, you're going to spend the next 18 months in jail.**

* A18

** A18 - A19

The sentence was then formally adjudged.

From the record of the proceedings both of the original sentence and the further imposition of sentence, it appears as if the district judge should have disqualified himself or at least had become so biased against the appellant that no fair judgment could be rendered.

It is not lightly that this issue is raised. However, an 18 month sentence under the circumstances presented herein is so outrageous as to require the most strict scrutiny by this Court. And while excessiveness of sentence is not reviewable by this tribunal, the improper factors already discussed, clearly present an issue for appellate review. See, e.g., United States v. Schwartz, *supra*. Also, United States v. Stein, 544 F. 2d 96 (2d Cir. 1976); United States v. Robin, 545 F. 2d 775 (2d Cir. 1976).

Aside from the improper considerations used to sentence Appellant, it is submitted that the district court abused its discretion in even revoking appellant's probationary status.

The American Bar Association has studied the manner in which probation is administered and revoked in the criminal justice system and has published certain guidelines which they feel judges should follow. These standards are as follows:

PART V. REVOCATION OF PROBATION AND OTHER SANCTIONS

5.1 Grounds for and alternatives to probation revocation.

- (a) Violation of a condition is both a necessary and sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:
 - (i) Confinement is necessary to protect the public from further criminal activity by the offender; or
 - (ii) The offender is in need of correctional treatment which can most effectively be provided if he is confined; or
 - (iii) It would unduly depreciate the seriousness of the violation if probation were not revoked.
- (b) It would be appropriate for standards to be formulated as a guide to probation departments and courts in processing the violation of conditions. In any event, the following intermediate steps should be considered in every case as possible alternatives to revocation:
 - (i) A review of the conditions, followed by changes where necessary or desirable;
 - (ii) A formal or informal conference with the probationer to re-emphasize the necessity of compliance with the conditions;
 - (iii) A formal or informal warning that further violations could result in revocation.

(Emphasis Appellant's)

ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROBATION,
APPROVED DRAFT. 1970 pp. 56-57

In its commentary to the above section, the ABA states that "the fact that a violation of a condition is a permissible basis for revocation does not support the idea that revocation should necessarily or automatically follow the establishment of a violation." (emphasis original) (ABA Report p 58) The report goes on to suggest that in deciding whether or not to revoke one's probation, the judge should ask, "do the intervening events provide the basis for a determination that confinement is now necessary to protect the public from additional criminal conduct by the defendant?" Does the intervening conduct justify the conclusion that the defendant can best be dealt with in an institutional setting? (ABA Report p. 58)

It seems clear that while the district court certainly could violate the Appellate, the intervening conduct was not such that imprisonment was warranted. In the words of the ABA Standards: confinement was not "necessary to protect the public"; the offender was not "in need of correctional treatment"; nor would it "unduly depreciate the seriousness of the violation if probation were not revoked."

Indeed, the treatment Appellant received in being violated and sentenced to confinement for 18 months for something less than a misdemeanor at State law* amounts to cruel and unusual punishment. If we view one of the traditional definitions of cruel and unusual punishment as being one which is "greatly disproportionate to the offense for which it was imposed"**, it is clear that Appellant's treatment was grossly violative of the Eighth Amendment protections. Of course, the violation and sentence relate back to the original offense and sentence, but justice demands that a minor violation not be treated in the manner faced by Appellant.

In short, there was a clear abuse of discretion by the district court's violating appellant and sentencing him to 18 months in prison as a result of momentary loss of good judgment. Justice truly cries out for relief in this matter.

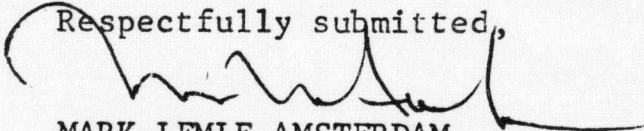
* While the revocation and sentence may not have been based on the ultimate plea, it is clear that disorderly conduct with a \$100 fine was a sufficient disposition for the District Attorney's Office.

** Weems v. United States, 217 U.S. 349 (1910)

CONCLUSION

In the interests of fairness of justice and based clearly on the above-cited precedents, the judgment of violation of probation and the sentence imposed thereon should be vacated and remanded for further proceedings.

Respectfully submitted,



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APPENDIX

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75CK 106

PLATT, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.: Corcoran
VS. X	
HARVEY SEGAL and KIVA S. MILLER	for deft MILLER: Jacob Evseroff 106 Joralemon St. Brooklyn, NY. TR5-0903 For Defendant: SEGAL: Marvyn M. Korbeal 125-10 Queens Blvd Kew Gardens, NY 261-4400

CLOSED

Did conspire to manufacture methaqualone with intent to distribute etc.

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine, (MILLER)	10,000 00	6-2-76	Paid to Clerk	100	
Clerk,		6-7-76	Paid to Clerk		100
Marshal,		6-21-76	Paid to Clerk	50	
Attorney,		6-21-76	Paid to Clerk		50
Commissioner's Court,		7-23-76	Paid to Clerk	200	
Witnesses,		7-24-76	Paid to Clerk		200
		10/6/76	Paid to Clerk	50	
		10/7/76	Paid to Clerk		50
		11/23/76	Paid to Clerk	75	
		11/24/76	Paid to Clerk		75

DATE	PROCEEDINGS
2-11-75	Before Bramwell, J - Indictment filed
2-21-75	Notice of Appearance filed (Miller)
2-21-75	Notice of Appearance filed (Segal)
2-21-75	Before Platt, J - case called - defts & counsels present - defts arraigned and each on his own behalf after being advised of his rights by the court enters a plea of not guilty - bail contd - adjd to May 2, 1975 to set a date for trial.
2/24/75	Magistrate's file 74 M 1566 inserted into CR file.
4/8/75	Notice of readiness for trial filed
6-6-75	Before PLATT, J - case called - defts & attys present - set down for recall June 20, 1975 @ 10:00 am - ready on 24 hour notice from June 16, 1975

750K 100

DATE	PROCEEDINGS
6/13/75	Notice of motion to suppress, etc. filed ret. 6/20/75 (MILLER)
6/20/75	Before PLATT, J.- Case called- adjd to 6/27/75
6/27/75	Before PLATT, J.- Case called- Deft and counsel present-case adjd to 9/5/75
6/27/75	Before PLATT, J.- Case called- adjd to 9/5/75 for trial
9-5-75	Before PLATT, J - case called - deft KIVA MILLER & counsel W. Sonenshine present - deft arraigned and after being advised of his rights and on his own behalf enters a plea of guilty count one after withdrawing plea of not guilty - sentence adjd without date - bail contd.
9/26/75	Before PLATT, J.- Case called- Deft and counsel present- On motion of A.U.S. Corcoran the indictment is dismissed as to deft SEGAL
9/26/75	By PLATT, J.- Order of dismissal filed (SEGAL)
10-31-75	Before Platt, J - case called - adjd to Nov. 7, 1975 (sentence-Kiva Miller)
11-7-75	Before PLATT, J - case called - deft sentenced to imprisonment for 5 years - to serve 3 months and execution of remainder of sentence is suspended and the deft is placed on probation for 4 years - deft to pay a fine of \$10,000. Execution of sentence is stayed to Nov. 28, 1975 at 10:00 am - bail contd. (KIVA MILLER)
11-7-75	Judgment & Commitment and Order of probation filed - certified copies to Marshal & Probation (KIVA MILLER)
11/24/75	Notice of motion to reduce sentence filed (MILLER)
11/6/75	By PLATT, J.- Memorandum and Order filed denying motion to reduce sentence
12/1/75	Certified copy of Judgment and Commitment retd and filed- deft delivered to MCC (MILLER)
5/20/77	Before Platt, J-case called-deft & counsel present-adjd to 6/10/77 for hearing on question of law-deft's brief by 6/3/77-reply brief by 6/8/77. jlj
6/10/77	Before Platt, J-case called-deft & counsel present-hearing adjd to set down for 7/1/77. jlj <i>Kiva Miller</i>
7/1/77	Before Platt, J-case called-deft & counsel present-hearing on violation probation ordered & begun-govt rests-deft rests-hearing concluded-after having been advised of his rights by the court and on his own behalf-deft enters a plea of guilty to violation of probation condition 1 of his probation-deft is sentenced for imprisonment for a term of 18 months-the remainder of deft's probationary period is to follow such term of imprisonment-execution of sentence is stayed to 7/8/77-bail \$10,000.00 PRB signed by deft & spouse. jlj
7/5/77	By Platt, J Violation of probation filed, Certified copies to probation & Marshall, jlj

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

KIVA MILLER

75
Yr.

106
Docket No.

2
Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
	(Document No.)	(a)	(b)	(c)	(d)
7/8/77	Before Platt, J-case called-deft & counsel present deft's motion for stay of execution of sentence-granted deft to surrender 7/22/77-bail contd.jlj				
A3					

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
TO THE HONORABLE THOMAS C. PLATT
United States District Judge

VIOLATION OF PROBATION REPORT

NAME: KIVA MILLER

MARITAL STATUS: Married

ADDRESS: 1212 Elm Avenue
Brooklyn, New York

NUMBER OF DEPENDENTS: One

AGE & DATE OF BIRTH: 30 (2/10/47)

ORIGINAL OFFENSE: CONSPIRACY TO
MANUFACTURE METHAQUALONE

SEX: Male

CITIZENSHIP: U. S. - Native

DEFENSE COUNSEL:

INDICTMENT NO.: 75-CR-106

PLEA:

Pleaded guilty to count 1 of a three count
indictment on September 5, 1975 before Your Honor.

ASST. U.S. ATTORNEY: Paul Corcoran, Esq.

PENALTIES

Count 1 - Title 21, United States Code, Section 841(a)(1) and
846

Maximum - "\$15,000 or 5 yrs. or both"

SENTENCE IMPOSED

DATE OF SENTENCE: November 7, 1975

Count 1 - Sentenced to the custody of the Attorney General for a period
of 5 years pursuant to 18, 3651. to serve 3 months, balance
of sentence suspended, four years probation and a fine of
\$10,000.

ORIGINAL OFFENSE:

Miller together with his codefendant Harvey Segal were engaged in the clandestine manufacture and distribution of Methaqualone. Miller was considered by agents to be the most culpable in the conspiracy, inasmuch as he purchased the chemical precursors, delivered them to the laboratory and sold the finished products to street dealers. Federal agents indicated that the operation lasted for eighteen months and two to three pounds of illicit drug were produced monthly, with a market value of \$500 to \$1,000 per pound. According to agents, at the time of arrest, Miller would not provide any cooperation as he represented that he had nothing significant to offer.

SPECIFIC VIOLATION OF PROBATION:

The probationer has failed to conform to the following general conditions of his probation as set forth in the form signed by him on November 7, 1975:

Condition (1) "You shall refrain from any violation of any law (federal, state and local). You shall get in touch immediately with your probation officer if arrested or questioned by a law enforcement officer."

As regards Condition (1), the probationer was arrested in Manhattan on January 23, 1977 by the New York City Police Department and charged with Grand Larceny, Burglary and Criminal Possession of Stolen Property. These charges were reduced to Petit Larceny, Criminal Trespass and Disorderly Conduct. Miller pleaded guilty to Disorderly Conduct and was sentenced to \$100 or five days. The fine was paid on February 8, 1977. The arresting officer informs that a complaint was filed by an off duty Nassau County police officer, who observed Miller and two accomplices removing cartons of merchandise from a warehouse gutted by fire and placing them in a van. Acting on this information, New York City police officers arrested Miller and his associates outside of Miller's place of business also in Manhattan. The arresting officer states that Miller and his two associates were one of many individuals, who were removing the merchandise from the burned warehouse. However, Miller was only one of four arrested because of the warehouse owner's refusal to press charges on each instance, including Miller's case. As a result, the complaint was satisfied by allowing Miller to plead guilty to Disorderly Conduct charges.

ADJUSTMENT UNDER PROBATION SUPERVISION

While under supervision, Miller has made a satisfactory adjustment. He has resided with his wife at 1212 Elm Avenue, Brooklyn, New York. Miller, has found a self employed truck driver, earning an approximate salary of \$600 per month. He continues to make monthly fine payments and his present balance is \$9,350.00. Additionally, there have been no other reported arrests of Miller since his commencement of probation supervision.

In view of the probationer's arrest and conviction while under supervision, we are reporting this matter to Your Honor's attention for whatever action you may deem necessary.

RESPECTFULLY SUBMITTED .

JAMES F. HARAN
CHIEF U. S. PROBATION OFFICER

Prepared by:

VICTOR P. ZACCHEO

Approved by:

William J. Murphy
kb - May 2, 1977

NOTE: Complete details regarding the circumstances of the original offense and the probationer's background may be found in the presentence report originally submitted to Your Honor on October 7, 1975.

1 THE CLERK: For sentence, United States v.
2 Kiva Miller.

3 THE COURT: Mr. Woodfield?

4 MR. WOODFIELD: Your Honor, I am looking at the
5 file. Your Honor, this file is Mr. Corcoran's. The
6 Government would ask for a bench warrant in this
7 matter. I would request a second call to discuss it
8 with Mr. Corcoran to make sure there is proper notice
9 because I don't see the defendant's counsel, who is
10 Mr. Sonenshine who is always prompt.

11 THE COURT: I will call it at the second call.

12 (Recess taken.)

13 THE CLERK: United States v. Kiva Miller.

14 THE COURT: Mr. Sonenshine, any reason why we
15 shouldn't proceed with sentencing?

16 MR. SONENSHINE: No.

17 THE COURT: Mr. Miller, any reason?

18 DEFENDANT MILLER: No.

19 THE COURT: Do you wish to say something?

20 MR. SONENSHINE: Yes, if I may. I read the
21 Probation report which largely confirms what I have
22 come to know of this defendant with respect to his
23 personal background.

24 The concluding line of the Probation report
25 indicates, and I think properly so, that the

4

1 defendant's apparent involvement in this offense
2 appears inconsistent with his entire background up
3 until this point, which was that of a very fine young
4 man making his way little by little in a business and
5 supporting his wife and living in an upright manner.

6 There is some conflict between what the agents
7 may have believed was his involvement and what the
8 defendant's version of it is, and it appears that the
9 defendant, prior to this, had no criminal record of
10 any kind and started to pick up and ultimately
11 deliver certain chemicals which the co-defendant had
12 the necessary knowledge or equipment or whatever is
13 needed to take it and combine it with others and
14 produce the drugs which I believe is a prescription-
15 type drug involved in this case.

16 It began according to the defendant with
17 simply doing that without any real awareness that
18 ultimately it was going to become part of an
19 illicitly-manufactured drug -- the chemical is an
20 innocuous, legitimate type of chemical, assuming
21 anyone isn't using it for improper purposes.

22 As matters developed, there came a time when
23 he actually did learn what the chemicals were being
24 used for. His guilt was he continued to do so with
25 that knowledge and continued building a drug business.

1 It was not good. Whatever urged him to allow himself
2 to become involved in this certainly is not to his
3 credit and is the basis upon which he entered a plea
4 of guilty.

5 I think all things considered, here is a young
6 man who up until that point was well on the road or
7 didn't know how his business would turn out -- I
8 guess it could be described as a successful business --
9 who supported himself nicely and his wife. They
10 don't have children.

11 I submit, your Honor, that this behavior is
12 entirely inconsistent with his entire mode of
13 behavior. It's the one time that he did depart from
14 an upright path. But I think his background is all
15 to his credit. He served in the United States Navy
16 and was honorably discharged. He was in North Vietnam
17 and attempted to stay on. It's not here in the
18 Probation report, his desire to remain in the SeaBee's
19 -- it was cut short because of lack of some of the
20 qualifications required. That wasn't really his fault.
21 He might still have been in the United States Navy.
22 He liked that.

23 Keeping in mind that the true or ultimate
24 purpose in sentencing the defendant is rehabilitation,
25 I think this defendant probably is about as close to

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1 rehabilitation as he can be as he stands before your
2 Honor. He became involved in this, realized this
3 and entered a plea of guilty. I guess not only to
4 acknowledge guilt but attempt to put behind him his
5 departure from the law

6 He lives today in the same manner he lived
7 before he became involved. He lives modestly and
8 works at his occupation in a small trucking business
9 which the Probation report describes as growing
10 slowly but steadily, and shows a sense of being a
11 good self-supporting business.

12 Complications have limited his income. He is
13 paying them back. If he is incarcerated, if that is
14 the result here, the end result would be he would
15 lose or almost certainly lose all of the efforts of
16 the business that he put into it and as well as the
17 assets in the business itself.

18 So that when he comes out, instead of hope-
19 fully better than he had been, he may be worse off
20 losing whatever he had that would keep him operating
21 and functioning properly within the community. That
22 would all be lost to him.

23 I ask your Honor to take that very much into
24 account in this situation.

25 Undoubtedly, your Honor has great power by

1 my business. I will lose it surely if I have to go
2 away.

3 Thank you.

4 THE COURT: Well, I am fully sympathetic with
5 that plea. The problem you present to me is I still
6 have the problem of not only your case but other
7 drug cases of a similar nature to attend to. I've got
8 to show some even-handedness in the imposition of
9 sentence. It is the policy of this Court, and I think
10 it's almost true of every courtroom in this building,
11 in a case of a drug offense, some punishment must be
12 imposed.

13 I have taken into consideration all you have
14 said and all your counsel has said and all that is set
15 forth in the Probation report. Were it not for your
16 good record and were it not for your particular
17 circumstances, you can rest assured the sentence would
18 have been far more severe than it is going to be. But
19 there must be some sentence imposed for a drug offense
20 of this nature.

21 If you don't impose such a sentence, the
22 next person who commits a similar offense would say
23 that I am not as fair with respect to them.

24 Drugs are just too serious a matter and I am
25 sure you realize that.

1 police officer says, if he was there. Maybe that's
2 the best way to handle it.

3 MR. CORCORAN: Your Honor wishes, as I said
4 it goes to the underlying offense, disorderly
5 conduct is grounds -- however, we are willing to
6 proceed with the underlying facts unless Mr. Termini
7 wishes to stipulate. I can tell you at this point
8 what the Government's evidence will be, and that
9 is that on or about January 7th, 1977 a fire
10 occurred largely destroying a complex of warehouses
11 on West 30th Street, one of the warehouses, one of
12 the seven buildings was 662 West 30th Street was not
13 so destroyed. However, the windows were broken
14 during the course of the activities by the Fire
15 Department. The warehouse contained -- it was a
16 public warehouse. It contained materials being
17 stored by a corporation running the warehouse for
18 other people. It was the Raleigh Warehouse
19 Corporation that was running the warehouse. The
20 materials that were in the burned out premises were
21 in their charge at the time.

22 On January 23rd at about 5:30 in the
23 evening, that's a Sunday evening, Nassau County
24 Police Officer Gilbert Sullivan was in the area
25 taking some photographs. He was off duty at the

1 time, and he observed a van pull up to the premises
2 662 West 20th Street. First he thought nothing of
3 it. He thought perhaps the owner was removing some
4 materials.

5 However, later he observed the same people
6 taking a second truck load out, and he noticed that
7 they were carrying flashlights and acting in a
8 rather surreptitious manner.

9 When he approached the van he observed
10 three individuals in the van, one of whom was
11 Kiva Miller, who was driving the van.

12 The officer approached with his badge out
13 and his gun visible. He identified himself, and
14 at that point Mr. Miller sped off in the van.

15 The van was subsequently found a few blocks
16 away, and it included a number of cartons of toys,
17 which the officer had observed the individuals
18 taking from the warehouse.

19 Subsequently, in a search of the neighborhood,
20 Mr. Miller was observed running from premises on
21 28th Street. He was stopped, taken back to the
22 premises, the other two people had been involved
23 in the looting of the warehouse were discovered
24 at that premises, additional cartons of toys were
25 found on the premises, a total of twenty six cartons

1 were found.

2 Mr. Miller at that time asked the officer
3 and the New York City police officer who was
4 accompanying the off-duty Nassau County officer
5 if he might just return the materials and avoid
6 the problem that he created, and they indicated
7 that was not possible.

8 He was then taken to the police station
9 where he was arrested and booked for grand larceny,
10 possession of -- criminal possession of stolen
11 property.

12 Subsequently a burglary charge was lodged
13 against him. Thereafter, Mr. Miller was permitted
14 to plead to disorderly conduct and was fined
15 a hundred dollars. That's essentially what the
16 Government's evidence would be.

17 THE COURT: His request was, would you be
18 willing to stipulate to that?

19 MR. TERMINI: I have to admit I'm not
20 excited about all aspects of that testimony.

21 THE COURT: What?

22 MR. TERMINI: I'm not exactly excited about
23 all the aspects of that testimony.

24 THE COURT: He said he would produce the
25 officer then you can cross examine him if you want.

1 THE COURT: If I don't put you under oath and
2 you give a false answer, the answer may be used in
3 a prosecution for making a false statement?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you understand if your plea
6 of guilty is accepted, there will be no further
7 hearing, so you will be waiving the right to a
8 further hearing and all the foregoing constitutional
9 right?

10 THE DEFENDANT: I understand, sir.

11 THE COURT: Now, the charges that you were
12 arrested for; grand larceny, burglary and criminal
13 possession of stolen property, and that this
14 constituted a violation of law. I don't know whether
15 there's a second half of that charge. Did you advise
16 Probation immediately?

17 THE PROBATION OFFICER: Yes, your Honor, he
18 contacted me immediately.

19 THE COURT: So it's only the first part of the
20 probation condition as to which there's a charge.
21 The question is, did you violate in respect a charge?
22 Did you violate that condition of probation?

23 THE DEFENDANT: I was arrested, your Honor.

24 THE COURT: My question is, did you violate
25 any Federal, State or local law?

1 imposed?

2 THE DEFENDANT: No, your Honor.

3 THE COURT: Have you discussed your plea of
4 guilty fully with your lawyer?

5 THE DEFENDANT: Yes.

6 THE COURT: Do you understand you will have
7 his assistance prior to the time I impose sentence?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: How old are you?

10 THE DEFENDANT: Excuse me?

11 THE COURT: How old are you?

12 THE DEFENDANT: 30, sir.

13 THE COURT: Having been advised as to your
14 Constitutional rights, the nature of the charge
15 against you and the consequences of your plea to
16 this violation, how do you plead to the violation
17 of probation; guilty or not guilty?

18 THE DEFENDANT: Guilty, your Honor.

19 THE COURT: The Court finds that there's
20 a factual basis for the plea and accepts the plea
21 of guilty to the violation. All right, Mr. Termini,
22 what do you want to say? Anything?

23 MR. TERMINI: Well, Judge, I think you have
24 a background, basically, of the situation. I would
25 like to point out that Mr. Miller has been very

1 cooperative with counsel from the entire time I
2 have been assigned to this matter. I have had
3 contact with friends and the wife of Mr. Miller.
4 I think he realizes that it was just a stupid
5 situation he got himself involved in. I don't
6 think he had intent of harming or hurting anybody.
7 I hope your Honor would consider all the factors
8 in Mr. Miller's case. He has been reporting, your
9 Honor. He has a large fine that he has paid off,
10 at least from the papers I have been given. I
11 would hope your Honor would keep all factors in
12 mind with Mr. Miller.

13 THE COURT: Do you want to say something,
14 Mr. Miller?

15 MR. CORCORAN: No, your Honor.

16 THE COURT: I said Mr. Miller, Mr. Miller.

17 THE DEFENDANT: Your Honor, I told my
18 lawyer, Mr. Termini, a few times that I can't even
19 say how sorry I am that it happened, because I
20 really didn't feel -- I wasn't -- well, I don't want
21 to go into the case, what I did and what I didn't
22 do, but I have a business, I'm trying to maintain
23 it. I'm the only owner, the only -- I'm the
24 president and vice president and secretary/
25 treasurer and I have three employees, and it's on

1 shoestring right, your Honor, and I'm trying my
2 best. I'm paying off my fine. I'm paying my bills,
3 and I'm -- I've never done anything other than the
4 time I've gotten in trouble myself.

5 THE COURT: Well, Mr. Miller, you're one of
6 the few people that I have given the kind of break
7 that I gave for a drug violation; a year and a half.
8 There are very few defendants who walk through this
9 courtroom and who are as deeply involved in drugs
10 as you were who got away with a three month sentence,
11 and believe me, I did it -- maybe I should have made
12 it clearer to you at the time -- I did it with the
13 thought that you didn't belong in this courtroom,
14 and you didn't -- you had more intelligence to get
15 yourself involved in something of this nature, and
16 within a year and a half you were one of the few
17 repeats. I think you may be the only one that has
18 come back to me on a violation of probation since
19 my three years on this bench, and it was -- it's
20 a real shock to me.

21 THE DEFENDANT: Your Honor --

22 THE COURT: Because I'm a pretty good judge
23 of character.

24 THE DEFENDANT: It will never happen again.

25 THE COURT: It's not going to, because I'll tell

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

RICHARD WITHERS, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1526 Webster Ave. Apt. B-3
Bronx, NY 10457.

That on the 28 day of SEPTEMBER 1977,
deponent personally served the within BRIEF OF APPELLANT
APPENDIX
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

~~By leaving~~ 2 true copies of same with a duly
authorized person at their designated office.

By depositing 2 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

PAUL CORCORAN ESQ.
ASSISTANT UNITED STATES ATTORNEY
ATTORNEY FOR APPELLEE
225 CADMAN PLAZA EAST
BROOKLYN, N.Y. 11201

Richard Withers

Sworn to before me this

28th day of September, 1977 Michael De Santis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

